United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL WITH PROOF OF SERVICE

76-1426

To be argued by
PAUL WINDELS, JR.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

MICHAEL MEDICO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

WINDELS & MARX
Attorneys for Defendant-Appellant
51 West 51 Street
New York, N.Y. 10019
(212) 977-9600

PAUL WINDELS, JR.
J. DENNIS McGRATH
Of Counsel

(6011B)

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

Page

CONSTITUTIONS

TABLE OF RULES AND REGULATIONS

TABLE OF OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

DOCKET NO. 76-1426

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

MICHAEL MEDICO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT MICHAEL MEDICO
(who will be referred to herein as "Defendant")

ISSUES PRESENTED FOR REVIEW

Issue I

Was it error for the Trial Court below to admit double hearsay testimony expressing an apparently inaccurate description of a "getaway car" allegedly used in a bank robbery, and further to admit tenuous and manifestly unreliable and incomplete evidence linking such alleged "getaway car" to Defendant?

Issue II

Had valid consent been obtained from the wife of Defendant prior to a search by agents of the Federal Bureau of Investigation of his apartment, and was the highly inflammatory evidence relating to Defendant's personal conduct arising from that search of any significant probative value to the question of his guilt under the indictment?

Issue III

Were the pretrial identification procedures of the Federal Bureau of Investigation so unnecessarily suggestive and was the legal representation of Defendant so inadequate as to deprive him of his right to due process of law?

STATEMENT

Appeal is taken from the judgment of conviction of Defendant entered in the United States District Court for the Eastern District of New York on September 17, 1976, by the Honorable Jack B. Weinstein following trial and conviction by a jury on June 28 and 29, 1976. Defendant was sentenced on September 17, 1976, by Judge Weinstein to 8 years imprisonment on Count Two of the indictment, and 5 years on Count Three of the indictment, sentences to be served concurrently. He has been in custody in respect of this matter since his arrest on June 2, 1976, and is presently at the United States Penitentiary in Terre Haute, Indiana.

FACTS

On May 27, 1976, at about 10:30 A.M., a branch of Chemical Bank located at 23-98 Bell Boulevard, Queens, New York, was held up by two men wearing stocking masks. One witness to the robbery testified at the trial below that both men were armed, one with a shotgun and the other with a rifle (Tr. 13)*. The only other witness to the robbery who testified as to the identification of the robbers stated that only one robber was armed and that he had a "long gun" (Tr. 44; Tr. 57; Tr. 59).

As the robbers fled, an unidentified person in the street allegedly noted a license number (700 CQA) and description (at first: a "brown Valiant," then: a "tan Dodge Valiant") as those of the car used by the robbers in their escape from the bank (Tr. 94). The number and description were, in turn, repeated by a second unidentified person to a bank employee (Tr. 93) who testified as to them at the trial.

Employees of the bank identified photographs of Defendant and John Sam Grillo, notwithstanding the stocking masks worn by the two robbers of the bank, from selections presented to them by special agents of the Federal Bureau of Investigation (June 24 Tr. 11-19);** and, based upon such identification, F.B.I. agents proceeded to Defendant's apartment

---

* "Tr." refers to the transcript from the June 28, 1976, trial in this action. "13" refers to the pertinent page of that transcript.

** Reference to pages from transcripts other than the main June 28 Trial Transcript will include the date in 1976 of that hearing, "Tr.", and the page. As here, "June 24 Tr. 11-19." All transcripts have been docketed, and made part of the record on appeal.

on June 2, 1976, where they were admitted by a neighbor (June 24 Tr. 47). Meanwhile, other agents located Defendant's wife with their child in the vicinity and escorted them back to the apartment where Mrs. Medico consented to a search (June 24 Tr. 34-39, 43, 47). The search produced a cardboard box containing a pair of red trousers (Tr. 79). The box and the trousers had been riddled with pellets, and lead fragments which "appeared to be" .22 or .25 calibre slugs fired from a .22 calibre pistol were found in a wall of the apartment (Tr. 80; Tr. 84).* Also found were some expended shotgun and other shells (Tr. 80-81). Nothing else deemed by the agents to be significant was in the apartment; specifically, no weapons were found (Tr. 82; Tr. 86).

Defendant was arrested that day, June 2, 1976; and he and Grillo were jointly indicted on June 11, 1976, by the United States Grand Jury for the Eastern District of New York, the indictment consisting of three Counts (A-3-5):

> One. That defendants "knowingly and wilfully, by force, violence and intimidation," took $23,662 from the employees of Chemical Bank, the deposits of which were insured by the Federal Deposit Insurance Corporation (18 USC § 2113(a)).
>
> Two. That defendants in committing said act "did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other

---

* According to the witness, Special Agent Loar, there could be no determination of when those slugs had been fired (Tr. 86).

persons present by the use of a dangerous weapon" (18 USC § 2113(d)).

Three. That defendants did "combine, conspire, confederate and agree together to commit an offense against the United States" in violation of 18 USC § 2113(a), 2113(d) and "by conspiring to rob, by force, violence and intimidation, and with a dangerous weapon, the Chemical Bank," which deposits were insured by the FDIC.

A motion was promptly made on Defendant's behalf to suppress as evidence the items removed from his apartment on the grounds that Mrs. Medico, in consenting to the search by the F.B.I. agents, was acting under great emotional stress and had during the course of that very morning taken marijuana, hercin, methadone and cocaine (June 24 Tr. 43-51). (Undisputed government information is that both Defendant and Mrs. Medico were seriously addicted to narcotics.) This motion was denied by Judge Weinstein (June 24 Tr. 52).

The government severed Grillo and brought him to trial on June 24, 1976. In addition to testimony by Mrs. Medico, the principal evidence against him consisted of testimony by three of the Bank employees who witnessed the robbery. One of the bank witnesses, Ms. Balzarini, identified him in court, notwithstanding the stocking masks worn by the robbers. Grillo was acquitted by the jury.*

---

* The information concerning the Grillo trial was obtained by telephone conversations with Grillo's trial attorney.

Defendant's case was then called for trial before Judge Weinstein on June 28, 1976. A jury was duly selected, and two of the same bank employees who had testified at the Grillo trial testified again and identified him (Tr. 17; Tr. 45). Their testimony differed in that one, Ms.Balzarini, testified that Defendant was unarmed (Tr. 56-57); and the other, Mr. Frisina, testified that Defendant carried a rifle, as distinguished from a shotgun (Tr. 13; Tr. 27). The government's case as compared with that relied upon in the unsuccessful Grillo trial was, however, augmented by the following evidence:

1. Testimony by a bank employee that he had been given by an unidentified person, who, in turn, had obtained such information from another unidentified person, the license number and a description of the getaway car (Tr. 90-92).

2. Testimony of the registered owner of the car bearing that plate number that it was not his car, that he did not know who owned that particular car, but that he had seen Medico in it (Tr. 98-103).

3. Testimony by agents of the F.B.I. identifying the trousers, expended pellets and shotgun and other shells taken from the Medico apartment, and their conclusion that a shotgun and/or a .22 cablibre pistol, had in their expert opinions, been fired at the box containing the trousers which had been placed against a wall in a bedroom of the Medico apartment (Tr. 79-85).

Based upon this evidence, the jury found Defendant guilty (June 29 Tr.11).

It is a well established principle of Federal procedure in criminal cases that a verdict will be reversed on appeal if there is any showing of significant prejudicial error during the trial or if one is left in grave doubt as to whether the error had such substantial influence. There is no burden to establish causal connection between the error and the guilty verdict. Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248 (1946). See also United States v. Bozza, 365 F.2d 206 (2d Cir. 1966); DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962).

Nevertheless, here, in view of the Grillo acquittal, the guilty verdict would seem manifestly to be predicated upon the additional buttressing evidence which we have noted, and we submit that the admission of this particular evidence was error. We will argue that under the hearsay rule evidence of the license plate number and the descriptions of the car were not admissible (In admitting this testimony Judge Weinstein observed: "You may have your reversal here." (Tr.95)), particularly in view of the tenuous and dubious connection with Defendant. We will also argue that the evidence of the firing of some otherwise unidentified and unconnected shotgun and/or .22 calibre pistol within the Medico apartment clearly was of a nature which would arouse antipathy (Judge Weinstein himself, on sentencing alluded to it: "This is a very serious crime, this is a crime where guns have been used, deliberately, where guns were fired in advance to make sure that they would kill . . ." (Sept. 17 Tr. 7)); and yet it had no real probative value, no real connection at all with the robbery alleged in the indictment.

In Point III some other matters, raised during the trial or raised at this stage by Defendant, will be presented to the Court.

ARGUMENT

POINT I

THE ADMISSION OF THE HEARSAY TESTIMONY CONCERNING THE "GETAWAY CAR" AND ITS CONNECTION TO MEDICO WAS PREJUDICIAL ERROR.

It is submitted that it was reversible error to permit a bank employee, William P. Carmody, to testify concerning a license plate number which he had supposedly obtained from an otherwise unidentified "bank customer" who had supposedly obtained said number from a "young fellow," identity also unknown. An attempt was made to connect this evidence with Defendant by testimony of William S. Cariola, co-employee of Defendant, who testified that he did not know who owned the vehicle bearing that license number but that he had previously seen Defendant driving it.

The testimony descriptive of the getaway car amounted to double hearsay, and was, of its very nature, untrustworthy in character. This is particularly true in view of the conflicts between it and the link-up witness, Mr. Cariola, as to the color and make of the car. In addition, as will be discussed in more detail below, while Mr. Cariola on cross examination denied knowing who owned the car, the jury was not aware of his bizzare claim, as presented at a side bar conference by the

Government's attorney, that although Caricla did not "own" the car, it actually was registered in his name.

The theory of the hearsay rule, as set forth in 5 Wigmore, Evidence §1362 (Chadbourn rev. 1974), bears repeating since the circumstances of this case show precisely why the trustworthiness of hearsay has always been so suspect:

> "The theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination. . . . It is sufficient here to note that the hearsay rule, as accepted in our law, signifies a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination:" (Emphasis in original)

Cross examination, in Wigmore's famous words,

> "is beyond any doubt the greatest legal engine ever invented for the discovery of truth."

5 Wigmore, Evidence § 1367 (Chadbourn, rev. 1974)

It is the powerful engine of cross examination that must be thwarted when a court decides that certain evidence shall be admitted as an exception to the hearsay rule.

The bank employee, Mr. Carmody, testified that about five minutes after the robbery, he went to the entrance to lock the door (Tr. 90). At that time, he said, a customer came to the door and told Mr. Carmody that he had the license plates of the car (Tr. 90). In piling hearsay upon hearsay, Mr. Carmody stated a "young fellow in a car" apparently was giving the plate number to the customer (Tr. 90-91). According to Mr. Carmody:

"A The customer said, 'I have the plates on the car,' and he turned around and was looking to the young man in the car.

Q And did he tell you any description of the car?

A Yes, he did.

Q And what was that?

A Brown Valiant. I forget the license plates. I have it written down on the checkbook." (Tr. 91).

The witness did not know the bank customer by name, and had not seen him since the robbery (Tr. 91-92).

Mr. Carmody had written on his checkbook (GX 10)* the license plate number 700 CQA, and the description "tan Dodge Valiant" (there is no such make, of course, as a "Dodge Valiant") (Tr. 92). Defendant's counsel objected to the admission of the checkbook bearing the license plate number and description, and at that time the Court questioned Mr. Carmody as to the circumstances under which he wrote down the plate number (Tr. 93-94):

"THE COURT: Was this written as they were talking to you, as the man was talking to you?

THE WITNESS: That's right. I pulled it out of my inside pocket.

THE COURT: Was it an accurate statement of what he said?

THE WITNESS: I could hear him through the door.

THE COURT: Did you write down what you heard?

THE WITNESS: As he was telling me I was writing.

---

* "GX" is a Government Exhibit from the June 28, 1976 trial. "10" is the number of that exhibit.

THE COURT: You were writing?

THE WITNESS: Yes.

THE COURT: And how old was this person?

THE WITNESS: Fifties.

THE COURT: Now, did you see him talking to anybody, physically?

THE WITNESS: There was a car parked in front of the bank with a young fellow in it, and he was telling the customer, and in turn the customer was telling me.

THE COURT: Could you hear what the man in the car said? What did you see? His lips move?

THE WITNESS: No. I was looking at the customer.

THE COURT: How could you know the customer was being told?

THE WITNESS: I couldn't hear through the door, what the kid was saying, but then he could turn around to me and talk through the door.

THE COURT: How old was the kid?

THE WITNESS: I would say in his twenties.

THE COURT: Have you ever seen him before? Have you ever seen him since?

THE WITNESS: (No response.)

THE COURT: Admitted over objection.

THE CLERK: Government's Exhibit 10 for identification marked in evidence."*

The Court summoned counsel to a side-bar conference and stated:

"You may have your reversal here. Pursuant to rule 804(b), I determine that

---

* The Court admonished the jury that it was hearsay, and they would have to decide how much probative value it had, bearing in mind the fact that the customer and the young man were not in Court, under oath, and subject to cross examination (Tr. 95).

the statement is offered as evidence of a material fact; that the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and that the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." (Tr. 95-96)

Rule 804(b)(5) of the Federal Rules of Evidence cited by Judge Weinstein states as follows:

"5) Other exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

Rule 805 of the Federal Rules of Evidence, "Hearsay Within Hearsay" provides:

"Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

The severe prejudice caused Defendant by the Court's admission of the double hearsay became obvious when the next witness, William S. Cariola, testified. Mr. Cariola, who formerly had worked at Plaza Cab Company with Defendant for two

months, stated that he had seen him during that time operating a 1965 off-white Dodge, license plate no. 700 CQA (Tr. 97-98).

On cross-examination, it was developed that Mr. Cariola, had a criminal record for possession of heroin and "had "served time" (Tr. 99). Mr. Cariola testified that he "[had] no idea" to whom the Dodge automobile bearing Plate No. 700 CQA belonged, although he had seen Defendant driving it (Tr. 100), and he steadfastly denied that he owned that car (Tr. 100-101).

What the jury did not hear, however, were certain incredible claims by Mr. Cariola, which were disclosed at a side bar conference. The Government's attorney admitted that the car was actually registered in the name of Cariola himself and that its registration was found in Cariola's possession (Tr. 102-103). Cariola's explanation, according to the Assistant United States Attorney, was that he lost his wallet and, when he found it again, discovered that it contained the particular registration (Tr. 102-103). The Court stated that it did not want to get into trying to connect Defendant with the wallet and the registration papers, since "it's too remote" (Tr. 103).

In its discussion of Rule 804(b)(5), Weinstein's Evidence, at Vol. 4, ¶ 804(b)(5)[01], p. 804-102, states that the rule is predicated upon the assumption that declarant is unavailable, which makes the need for the evidence "self-evident." The text goes on to state (p. 804-102):

> "If the hearsay is relevant and no other evidence or very little other evidence is available on the same point, this need will be great. <u>If in addition, probative value is high because some indicae of reliability are present</u>, the trial judge may conclude that the hearsay statement

> is admissible pursuant to Rule 804(b)(5) when a trustworthiness within the spirit of the Rule 804 [illegible]lass exceptions has been demonstrated." [Emphasis added]

In reporting on the residual hearsay exceptions contained in Rules 804(b) and 803 of the Federal Rules of Evidence, the Senate Committee on the Judiciary observed that:

> "It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fail within one of the other exceptions contained in rules 803 and 804(b)."

Senate Committee on the Judiciary, Report on Federal Rules of Evidence, 93rd Congress, 2d Session, Report No. 93-1277, pp. 18-20 (October 18, 1974).

Rule 804(b)(5) has not as yet been subjected to extensive judicial interpretation. In one case, Lowery v. State of Maryland, 401 F.Supp 604 (D. Md. 1975), the court refused to admit defendant's statement against interest under either Rule 804(b)(3) or the "other exceptions" provision of 804(b)(5), citing the Senate Report referred to supra. In the other case, United States v. Yates, 524 F.2d 1282 (D.C. Cir. 1975), the Court of Appeals for the District of Columbia considered whether an out of court statement by a person not called as a witness could be admitted against a defendant in a burglary prosecution under either Rule 803(24) or 804(b)(5) of the Federal Rules of Evidence. The Court concluded that the Confrontation Clause of the Sixth Amendment barred any attempt to admit such evidence, and reversed defendant's conviction:

"Although not argued by the Government, we have considered whether Jones' statement could be admitted under any of the evolving, amorphous exceptions to the hearsay rule, such as those contained in Rules 803(24) or 804(b)(5) of the new Federal Rules of Evidence. We conclude, however, that the Confrontation Clause of the Sixth Amendment bars any attempt to admit this evidence. Dutton v. Evans, 400 U.S. 74, 88-89 & n. 19, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970), teaches that the out-of-court statements of a person not called as a witness and never previously made available for cross-examination are admissible at least when three conditions are satisfied: (1) there are 'indicia of reliability" surrounding the evidence; (2) the evidence is 'peripheral' rather than 'crucial' or 'devastating'; and (3) the witness is equally available to the prosecution and the defense. Admittedly, the precise contours of these three requirements are not free from doubt, nor is it certain whether all three must be satisfied in every case. But in this case, none of the three conditions are met." 524 F.2d at 1285-86.

Weinstein's Evidence, at Vol. 4, ¶ 800[03], pp. 800-17-18 emphasizes that in a criminal case, the trial judge's discretion to admit hearsay evidence against a defendant is decidedly curtailed:

"In a criminal case, on the other hand, the hearsay rule enjoys a 'special sacrosanctity,' and is employed far more stringently 'in spite of the repeated judicial protestations that civil and criminal trials are governed by the same rules of evidence.' This is due to the greater danger of prejudice to a criminal defendant, and because of the operation of other factors affecting the admissibility of evidence such as the right of confrontation, (see ¶ 800[04], infra), limitations on the use of extra-judicial statements of the accused imposed by the privilege against self-incrimination and the right to counsel, and rather limited discovery. Reversible error is found considerably more frequently in criminal cases where hearsay is improperly admitted against a defendant. See commentary to Rule 103, supra. Consequently, the trial

judge's discretion to admit hearsay evidence against a criminal defendant is decidedly curtailed."

As was noted in Weinstein's Evidence at Vol. 4, ¶800 [04], p. 800-18, in discussing the desirability of indicating at a pretrial conference the existence of statements whose admissibility is problematic:

> "Such a procedure may be particularly desirable in criminal cases where the proferred statement is often so prejudicial that a fair trial becomes impossible once its contents are revealed to the jury."

Although the Government's "need" for the hearsay testimony is apparent in view of the Grillo acquittal, it is equally clear that the "indicae of reliability" were tenuous or perhaps non existent. And, this raises serious questions under the "Confrontation Clause" of the Sixth Amendment of the United States Constitution, which provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

See United States v. Yates, 524 F.2d 1282, 1285-86 (D.C. Cir. 1975), supra.

As the Supreme Court observed in California v. Green, 399 U.S. 149, 90 S. Ct. 1930 (1970):

> "The concern of most of our cases [interpreting the Confrontation Clause] has been

> focused on . . . situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him at trial. These situations have arisen through application of a number of traditional 'exceptions' to the hearsay rule, which permit the introduction of evidence despite the absence of the declarant usually on the theory that the evidence possesses other indicia of 'reliability' and is incapable of being admitted, despite good-faith efforts of the State, in any way that will secure confrontation with the declarant. Such exceptions, dispensing altogether with the literal right to 'confrontation' and cross-examination, have been subjected on several occasions to careful scrutiny by this Court." 399 U.S. at 161-62, 90 S. Ct. 1937-37.

In the present instance there are no such indicia of reliability to justify admission of the absent declarants' statements about the license number of the alleged getaway car. We know nothing about the declarants themselves or their motives. We do not know whether the declarants might have had reason for reporting an incorrect plate number. Was the "young man at the curb" a confederate? It is apparent that he himself wanted to avoid being a witness. We do not know the circumstances under which the "young man at the curb" observed the car and the license plates. Significantly neither declarant has ever come forward to make his name known to the bank employees or F.B.I. investigators.

Furthermore, although the bank witness, Mr. Carmody, testified that he had written down the license number he had been told, there is no indication as to what the other two hearsay links had done. Had the unidentified "young man at the curb" written down the number, or was he volunteering from

memory? (Mr. Carmody testified that this incident transpired about five minutes after the escape of the robbers) [Tr. 90]. Did the unidentified customer hear the young man correctly? Could the customer have transposed numbers or letters? And, what about the clear disparity in the identification of the car? Does not this raise questions?

Having been placed at the scene the alleged getaway car was then connected with defendant through the testimony of Cariola, the man who is the registered owner of the car, although he denied on cross examination that the car was his (Tr. 100-101).

Accepting arguendo the claim of the witness Cariola that he did not own the car, and, not even in testimony, that his wallet had disappeared, it is incomprehensible that whoever did register the vehicle in Cariola's name would then insert the registration in Cariola's wallet rather than keep it himself. The jury did not have the opportunity to consider these bizarre circumstances in weighing Cariola's testimony, since they were revealed only at the side bar conference, out of the jury's hearing.

Rule 403 of the Federal Rules of Evidence states as to the exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Again, with reference to 4 Weinstein's Evidence, ¶804 (b)(5)[01], p. 804-102:

> "Rule 804(b)(5) . . . is subject to Rule 403. Even if circumstantial guarantees of trustworthiness are present and exclusion of the statement would result in the absence of any relevant evidence on the point, Rule 403 requires exclusion if the probative value of the statement is substantially outweighed by the dangers of prejudice and confusion." (Emphasis added)

The danger of unfair prejudice was apparent at the time of trial, and the outcome was that defendant was convicted of armed bank robbery presumably based upon the constitutionally illegal search of his apartment and this hearsay testimony linking him to the getaway car.

The unfair prejudice can be seen by the fact that the trial of the severed co-defendant and alleged co-conspirator, John Sam Grillo, on June 24, 1976 resulted in an acquittal. The Government's case in the Grillo action did not include testimony concerning the getaway car, nor introduction of the fruits of the search.

After "pondering all that has happened" here, one cannot say that the judgment was not substantially swayed by the erroneous admission of the hearsay testimony concerning the identification of the license number of the alleged "getaway" car. When followed by the mysterious testimony of the fellow employee, Cariola, linking defendant to the car bearing that plate number, a car registered in the name of the witness, Cariola, but which he denied owning, the grave prejudice to defendant is clear.

POINT II

THE EVIDENCE THAT A GUN HAD BEEN FIRED IN THE DEFENDANT'S APARTMENT WAS INHERENTLY PREJUDICIAL AND OF NO PROBATIVE VALUE AS REGARDS THE CHARGES IN THE INDICTMENT, AND IT WAS OBTAINED BY A SEARCH WITHOUT VALID CONSENT.

The other significant item of evidence presented by the government at Defendant's trial and not used in its unsuccessful Grillo trial was to the effect that a gun had been fired against the wall in Defendant's apartment. The evidence consisted of a cardboard box stuffed with a pair of trousers which had apparently been placed against the wall at which the gun was fired. The F.B. I. "expert" testimony was to the effect that the gun might have been a small, light pistol of .22 caliber or a shotgun. There is no evidence whatsoever that a pistol was used by either of the robbers; and, as to Defendant, it will be recalled that one of the two witnesses stated he carried a rifle as distinguished from a shotgun and the other witness testified that he was unarmed. No weapon was found in the apartment. Obviously, as a practial matter, this evidence has no probative value whatsoever linking Defendant to the bank robbery. One thing it suggests is that Defendant apparently was the sort of person who fired dangerous weapons in crowded inhabited [illegible]s evincing a reckless disregard for the basic rights of others. In short, it was highly prejudicial and in fact had a considerable emotional impact on a sophisticated and experienced trial judge. It having been admitted, the jury was obligated to consider it, and the only message it carried was: "get this dangerous man off the street for your own sake and that of

others." It is the essence of our system of criminal jurisprudence that the jury be completely screened from such totally irrelevant and highly inflammatory material.

In Walker v. United States, 490 F.2d 683 (8th Cir. 1974), a pistol found on defendant at the time of his arrest, but not specifically connected with the crime, was admitted into evidence. The Eighth Circuit reversed and remanded for a new trial, holding the admission of the pistol to be prejudicial error. The Court observed:

> "Further the pistol is 'irrelevant' in the other sense of the word, since it leads only to inferences about matters that were not properly provable in this case, i.e., the defendant's dangerous character. See McCormick's Handbook of the Law of Evidence § 185 (1972). As the California Supreme Court has correctly stated in People v. Riser, 47 Cal.2d 566, 305 P.2d 1, 8 (1956):
>
> > When the prosecution relies . . . on a specific type of weapon, it is error to admit evidence that other weapons were found in [defendant's] possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons.
>
> Here the pistol lent itself to inferences regarding the defendant's propensity to behave violently, and, as with other evidence of a defendant's bad character,' the prosecution may not employ such tactics unless the defendant himself places the matter at issue. See McCormick, supra at § 190. In the setting of a jury trial, whatever probative value this sort of evidence may have is outweighed by the danger of prejudice. Admission of the pistol, therefore, compels reversal, for in our examination of the whole record, we are satisfied the error was more than harmless." 490 F.2d at 684-685.

As here, the prosecution in the Walker case did rely in its closing argument on such an inference that defendant was of bad character. 490 F.2d at 685, f.n. 3.

In addition to all this, we submit that the means by which the government obtained this evidence in the first place was questionable. A suppression hearing was held on this matter during which the following was developed:

Mrs. Medico, who is supposed to have given a voluntary consent to a search of her apartment, testified that on June 2, while she was in a phone booth in a Bronx candy store calling a friend, a man who identified himself as an F.B.I. agent slammed down the receiver and said he would like to speak to her (June 24 Tr. 43).* According to Mrs. Medico, the Agent wanted her to accompany him to his car, but:

> "I had my daughter and she was a little hysterical and didn't want to go. I wasn't hearing everything he was saying." (June 24 Tr. 43-44).

When the Agent had asked Mrs. Medico to leave the telephone booth:

> [The child] started crying, getting scared and saying, 'Let's go home, I don't want to go with them.'" (June 24 Tr. 44)

As Mrs. Medico testified, she "had to drag" her daughter to the F.B.I. car. "She was crying." (June 24 Tr. 44). Mrs. Medico assured her daughter that everything was all right, and that they were going to go home (June 24 Tr. 44).

---

* Although Mrs. Medico did not recall the agent telling her his name, it was apparently Barry W. Mawn, who also testified at the suppression hearing (June 24 Tr. 31-41).

Once the Medicos entered the F.B.I. car, the Agents began to question Mrs. Medico as to the whereabouts of Defendant (June 24 Tr. 45).* Mrs. Medico said she didn't know where her husband was, and why he was running. "I don't remember, I was nervous, and my daughter was crying." (June 24 Tr. 45) As the F.B.I. car proceeded along the Grand Concourse, according to Mrs. Medico, every few feet the car would stop and another agent would come over. The agents in the car would exclaim "We got Mrs. Medico. And we are in pursuit of her husband." (June 24 Tr. 46).

Mrs. Medico's testimony was that she was on drugs the day of June 2 (June 24 Tr. 49). In response to Defendant's attorney's question as to what sort of drugs she had taken and when she had taken them that particular day, June 2, she testified:

"A I had smoked some pot, cocaine, heroin, methodone.

Q When?

A Before I left the house to go find Michael."

(June 24 Tr. 50)

In addition, according to Mrs. Medico, she was under psychiatric care at the time:

"A I go to a Dr. Rosen for nerves and hypertension, and anxiety and things like that.

Q How does Dr. Rosen treat you?

A I see her once a week. She gives me tranquilizers and sleeping medication.

---

* According to Agent Mawn's testimony, he at least, already knew that Michael Medico was in custody (June 24 Tr. 34).

Q How long have you been seeing this doctor?

A Well, I haven't been there since this happened. Two weeks, But I was seeing her for a few weeks.

Q Were you nervous on this particular day?

A Yes. Very.

(June 24 Tr. 50-51)

At approximately 200th Street and the Grand Concourse, the agents got out of the car for a moment, came back, and stated that they had Defendant, and they would like to go back to her apartment. They asked whether Johnny [Grillo] and Gail were there. Mrs. Medico responded that they were not. (June 24 Tr. 46) The agent asked if he could search the apartment, and Mrs. Medico said "Yes" (June 24 Tr. 46).

Arriving back at the apartment, Mrs. Medico stated that "there were maybe ten -- it seemed like ten more agents there already. . ." (June 24 Tr. 47). Those agents had already entered the apartment, having been admitted by Mrs. Medico's friend, Ina Castro, (June 24 Tr. 47).*

The agent told Mrs. Medico:

"'You can either sign this [the consent form] now or we can get a search warrant. It doesn't make any difference to us.' I said, 'I will sign it then.'" (June 24 Tr. 48)

As Mrs. Medico explained it when asked whether she understood that she did not have to give consent:

---

* The record does not indicate whether the search of the apartment began before or after Mrs. Medico arrived, although Agent Mawn testifed that "when I entered the apartment [with Mrs. Medico] there were several fellow agents already there" (June 24 Tr. 37).

"Right. Well, at that time I didn't know I didn't have to give consent. I thought if I didn't they would get consent five minutes later and come back with a search warrant. Instead of having static I gave the permission." (June 24 Tr. 48).

During all of this, Mrs. Medico and the agents were secluded in the kitchen, and she did not see her friend, Ina Castro, or discuss the consent form with her. "I wasn't allowed to see Ina." (June 24 Tr. 49).

The agent had told Mrs. Medico:

"'We are not here to arrest any woman with a child. We don't want to take a child away from its mother. We gave Gail the same option a few weeks ago. She could have cooperated with us.'" (June 24 Tr. 48).

The F.B.I. agents did not threaten Mrs. Medico, she stated, but:

"I was scared. You know, all I heard was 'we don't want to take a mother away from her child.' They didn't pull out no guns or anything. I guess the way it was, I was scared. I couldn't say -- I don't think they threatened me. Just by their actions, their talk, they mentioned the part about how Johnny [Grillo] was an escapee and we can take you for harboring or abetting a fugitive." (June 24 Tr. 51)

Although Mrs. Medico had been arrested when she was a teenager, this was the first time in six or seven years that she had occasion to have contact with the police (June 24 Tr. 51).

The F.B.I. agent, Barry Mawn, was not questioned about Mrs. Medico's demeanor at the time he confronted her, but he did testify that he knew that Defendant was in custody when he located her in the candy store phone booth (June 24 Tr. 34), and he verified the fact that her small daughter was with Mrs.

Medico (June 24 Tr. 35). As the F.B.I. car proceeded to the Grand Concourse, he met with another agent who confirmed to Mawn that he did have Defendant in custody and that he was going to be taking him to the New York Office (June 24 Tr. 35).

> "At that point I returned to my car. At that point advised Mrs. Medico that her husband was in custody and would be transported to our New York office. I would like to interview her and would like to go back to her apartment for the possibility that Mr. Grillo may be there, which she said he wasn't. We asked if we could go back and conduct a search of the house. She consented to that."
>
> MR. RAPPAPORT: Objection to the consent.
>
> THE COURT: Sustained." (June 24 Tr. 36-37)

Although it took only about a minute to reach the apartment, according to Agent Mawn, "when I entered the apartment there were several fellow agents already there. . . standing in the hallway, foyer of the apartment." (June 24 Tr. 37)

The Trial Court denied Defendant's motion to suppress (June 24 Tr. 52).

In order to have a valid warrantless search, the Government must prove that consent was "freely and voluntarily given" Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792 (1968).

As the leading case of Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973) held, in considering whether consent to a warrantless search was voluntary:

> ". . . it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced. It

> is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches." 412 U.S. at 233, 93 S.Ct. at 2050.
>
> * * *
>
> "Voluntariness is a question of fact to be determined from all the circumstances. . . ." 412 U.S. at 248-49, 93 S.Ct. at 2059.

It is submitted that a consideration of "all the circumstances" here must lead to the conclusion that Mrs. Medico's "consent" to the search of her apartment, even though evidenced by a writing, was not "voluntary", and, in fact, Defendant's Fourth Amendment rights were violated.

In the recent case of United States v. Griffin, 530 F.2d 739 (7th Cir. 1976), where a search was held to be made pursuant to a voluntary giving of consent, the court considered the "totality of the circumstances" as required by Schneckloth. Observing that the court in Schneckloth had found that neither the presence nor the absence of any single action can be controlling in the determination, the Seventh Circuit continued (530 F.2d at 742):

> "In considering the 'totality of the circumstances' surrounding the consent in this case, we must be mindful of various factors which other courts have deemed important in determining voluntariness. A consent obtained through the use of coercion, whether actual or implicit, is inherently involuntary. The form of coercion, whether it be physical or psychological, is of no consequence. Subtle coercion, in the form of an assertion of authority or color of office by the law enforcement officers may make what appears to be a voluntary act an involuntary one. See, e.g., Johnson v. United States, 333 U.S. 10,

68 S. Ct. 367, 92 L.Ed. 436 (1948); United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971)."

The instant case, upon a consideration of the "totality of the circumstances" reveals strong evidence of implicit psychological coercion upon Mrs. Medico. Under the power of drugs, with an hysterical daughter, her husband just arrested by the F.B.I., cut off from consulting with her friend, Ina Castro, who might have advised her, with perhaps as many as ten agents in her apartment, with threats being made about the fact that "we don't want to take a mother from her child," it was not surprising that Maria Medico would have succumbed, "instead of having static." (June 24 Tr. 48).

The F.B.I. agents' statements about not wanting to take a mother away from her child, and how they could arrest Mrs. Medico for harboring or abetting a fugitive amounted to undue coercion, regardless of whether it might be considered subtle or psychological. It is akin to the case of United States v. Bolin, 514 F.2d 554 (7th Cir. 1975), where defendant's written consent to a search of his home was held to be coerced, involuntary and unconstitutional.

Although the Bolin case differs from the present case in the respect that defendant was in custody when he signed the search waiver, it is similar to the instant case in that the consent in Bolin had been obtained in response to a threat to arrest defendant's girl friend if defendant refused to sign the search waiver.

According to defendant's affidavit, the threat was a positive one. The police:

"would arrest my girl friend, who is now my wife, if I did not give my consent." 514 F.2d at 559.

The Government's witness testimony at the suppression hearing was that:

"We told him that if he signed the search waiver, that we would not arrest his girl friend." 514 F.2d at 559.

The Seventh Circuit stated that while the Government's testimony concerning the arrest of the girl friend was:

"phrased in the language of promise, there is no question that it was in fact an implied threat that if the consent were not signed the woman would be arrested. Defendant's affidavit makes it evident that he understood the statement as a threat. The Supreme Court has held that the Constitution requires that 'a consent not be coerced, by explicit or implicit means, by implied threat or covert force.' Schneckloth, supra, 412 U.S. at 228, 93 S.Ct. at 2048. Where consent is given in response to such an implied threat, the consent cannot be considered voluntary." 514 F.2d at 560.

In the present case, Mrs. Medico was at the very least given an "implied" threat that she might be arrested and/or separated from her daughter because of the claim that she had "harbored or abetted" a fugitive (June 24 Tr. 51). Mrs. Medico took those words as a threat. She "was scared" (June 24 Tr. 51). So, while to Mrs. Medico, she was not threatened in the sense that the F.B.I. agents "didn't pull out no guns or anything" (June 24 Tr. 51), the subtle threats were just as coercive and obtained exactly the same result -- the "voluntary" consent to search the apartment, which led to discovery of the damaging evidence used against her husband in his trial.

In United States v. Bryant, 406 F.Supp. 635 (E.D. Mich. 1975), the District Court considered that there was a lack of non-coercive factors, and a number of coercive ones. Among the latter were the fact that defendant and her brother were surrounded by six police officers or agents, and there was no indication from the record of the evidentiary hearing that the officer told the defendant that she had a constitutional right to refuse to consent. (406 F.Supp. at 640) As to the latter point, the Court stated that it did not mean to say that in every instance such advice must be given before a consent is valid, but it is "a factor to be considered in the 'totality of circumstances' test" [citing Schneckloth, supra] 406 F.Supp. at 640, f.n.1 (emphasis added).

Here, not only were there a large number of agents present at the Medico apartment, but there is no indication that Mrs. Medico was ever informed that she had a constitutional right to refuse her consent. If Mrs. Medico had known that the question of giving or not giving consent involved more than just avoiding "static", but also involved a constitutional right, confused and harassed as she was, she may well have refused consent.

POINT III

OTHER MATTERS

A. THE IDENTIFICATION PROCEDURES EMPLOYED BY THE GOVERNMENT ARE SUGGESTIVE OF POSSIBILITIES OF MISIDENTIFICATION.

The pre-trial identification procedures of the government were attacked at a special hearing following which Judge Weinstein denied Defendant's motion to suppress. A reading of the transcript does suggest possibilities of misidentification. Moreover, these are augmented by subsequent testimony at the trial of the two bank employees making identification. One, Mr. Frisina, who could not see distances, and who was not wearing his glasses at the time of the robbery, testified that his identification was based in part by seeing the bank's own photographs of the robbers in the course of the robbery (Tr. 27, Tr. 35). He never saw more than the profile of the masked robber (Tr. 30). The other witness, Ms. Balzarini, stated that she could not remember anything about the clothing the robber wore (Tr. 53). As it has previously been pointed out, the two witnesses differed markedly in respect of the most striking and obvious visual aspect of this crime and that is the weapons which were employed and who had them. Mr. Frisina testified that the robber he identified as Defendant carried a rifle, as opposed to a shotgun, while Ms. Balzarini insisted he was unarmed (Tr. 13, Tr. 57). Against this background, it is suggested that the court review the transcript of this hearing. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968).

B. ADEQUACY OF REPRESENTATION BY TRIAL COUNSEL

Although a review of the transcript of the proceedings below including the suppression hearing, trial, and sentencing, fails to reveal to appellate counsel tangible indication of inadequate representation by his assigned trial counsel, Defendant has specifically requested that this point be raised for him on appeal.

While the jury was deliberating, Defendant set forth some of his objections on the record:

1. Because the U.S. Marshals were sitting "right behind me, directly behind me" throughout the trial, Defendant felt their positioning prejudiced his case (June 29 Tr. 5).

2. The trial (June 28) took place so soon after Defendant's arrest (June 2), indictment (June 11), and arraignment (June 18), that he was not able to develop his defense by securing witnesses. "I talked with my lawyer about this, and he assured me that this is the way they do things. I don't know. I never been on a trial." (June 29 Tr. 6)

3. Although the alleged co-conspirator, John Sam Grillo, had been tried and acquitted of the same charges, Defendant had no access to the transcript of the Grillo trial to see how the witnesses testified at that trial, and whether or not they testified differently than they did at his trial.* "We didn't have time to get a transcript from the other trial. I just want the record to know I object to the whole situation" (June 29 Tr. 7).

---

* Certain bank witnesses testified at both the Grillo and Medico trials.

Judge Weinstein treated Mr. Medico's objections as a motion for a mistrial. The Government took the position that the trial was conducted fairly, and that defendant had a fair notice to prepare a defense, and that there were no grounds for a mistrial. The Court denied the motion (June 29 Tr. 7).

4. In correspondence with appellate counsel Mr. Medico also objected to testimony by F.B.I. agent Robert Edward Booth, the arresting agent, that on June 2, 1976, as part of his duties as an F.B.I. officer with the bank robbery squad, he was working in the Bronx on:

> "information concerning an escaped federal prisoner by the name of --"

The Court interrupted:

> "No. That has nothing to do with this case, ladies and gentlemen. Don't tell us with respect to this defendant. We are not interested in your other duties. Is that clear to all of you, ladies and gentlemen?" (Tr. 65)"?

At a side-bar conference, Mr. Medico's trial counsel moved for a mistrial:

> "MR. KELLY: Judge, I believe I am constrained to move for a mistrial at this time, because of the statement of this agent. I think it's highly possible that the Jury may infer that this defendant, particular defendant on trial is the escaped individual that this agent was looking for at this time.
>
> (Whereupon, the following was directed to the Jury.)
>
> THE COURT: Ladies and gentlemen, this defendant is not that escaped person. Do you all understand that? Do any of you have a problem with that?" (Tr. 65-66)

Every juror and alternate answered in the affirmative

that they understood Judge Weinstein's statement that "this defendant is not that escaped person." (Tr. 66-68)

5. Defendant vociferously objected to the hearsay testimony about the alleged getaway vehicle by Mr. Carmody of the bank and the connecting testimony of John Cariola. This point has been argued in the brief as Point I. Nevertheless, it is mentioned here again because Defendant asserts it supports his objections concerning "adequacy of counsel."

CONCLUSION

For the reasons stated, the judgment of conviction herein should be reversed.

Respectfully submitted,

WINDELS & MARX
Attorneys for Defendant-
Appellant
51 West 51st Street
New York, N. Y. 10019
(212) 977-9600

OF COUNSEL:

Paul Windels, Jr.
J. Dennis McGrath

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

THOMAS VERA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 30-76 21ST LONG ISLAND CITY, N.Y.

That on the 11 day of JANUARY, 1977, deponent personally served the within BRIEF OF DEFENDANT-APPELLANT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing~~ true copies of same enclosed ~~in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

DAVID G. TRAGER
U.S. ATTORNEY FOR THE
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, N.Y. 11201

Thomas Vera

Sworn to before me this
11 day of January, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978